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Supreme Court, U.S.

E I L E D

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No. 98-387

In the Supreme Court of the United States

OCTOBER TERM, 1998

GREATER NEW ORLEANS BROADCASTING ASSOCIATION, INC.,
individually and on behalf of its members;
PHASE II BROADCASTING, INC.; RADIO VANDERBILT, INC.;
KEYMARKET OF NEW ORLEANS, INC.; PROFESSIONAL
BROADCASTING, INC.; WGNO, INC.; BURNHAM BROADCASTING
COMPANY, A Limited Partnership,

Petitioners,

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS
COMMISSION,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

In this case, the court of appeals upheld a federal ban on the broadcast of advertising concerning lawful casino gaming. The question presented is:

Whether the federal government may, consistent with the First Amendment, undertake to suppress lawful casino gaming by banning truthful, non-misleading broadcast advertising for such gaming.

INTERESTED PARTIES

Greater New Orleans Broadcasters Association ("GNOBA"), a non-profit corporation with no parent company or non-wholly owned subsidiaries, has filed this document on behalf of its members, which are listed below. Where applicable, this list verifies all parent companies and non-wholly owned subsidiaries of each GNOBA member.

- (1) WEZB-FM, WWL-AM,
WLMG-FM/WSMB-AM,
Sinclair Radio of New Orleans, Inc.
1450 Poydras Street
New Orleans, LA 70112

A wholly owned subsidiary of
Sinclair Broadcast Group
2000 West 41st Street
Baltimore, MD 21211

- (2) WBOK-AM 1230
Christian Broadcasting Corp.
1639 Gentilly Boulevard
New Orleans, LA 70119

- (3) WBYU-AM
KMEZ-FM
WRNO-FM 99.5 FM
Centennial Broadcasting
201 St. Charles Avenue, Suite 201
New Orleans, LA 70130

- (4) WCKW-FM 92.3
WCKW-AM 1010
222 Corporation
3501 N. Causeway Blvd., Suite 700
Metairie, LA 70002

- (5) WDSU Television, Inc.
WDSU-TV Channel 6
Pulitzer Broadcasting Co.
846 Howard Avenue
New Orleans, LA 70113

A wholly owned subsidiary of
Pulitzer Broadcasting
101 South Hanley
Clayton, MO 63105

A wholly owned subsidiary of
Pulitzer Publishing
900 North Tucker
St. Louis, MO 63101

- (6) WGNO, Inc.
#2 Canal Street
New Orleans, LA 70130

A wholly owned subsidiary of
Tribune Broadcasting
435 North Michigan
Chicago, IL 60611

A wholly owned subsidiary of
Tribune Company
435 North Michigan
Chicago, IL 60611

- (7) WLTS-FM 105.3
WTKL-FM 95.7
Phase II Communications
3525 N. Causeway Blvd
Suite 1053
Metairie, LA 70002
- (8) WNOE-FM 101.1
KKND-RM 106.7
KUMX 104.1
Clear Channel Broadcasting, Inc.
929 Howard Avenue, 2nd Floor
New Orleans, LA 70113
- (9) WNOL-TV Channel 38
Quincy Jones Broadcasting, Inc.
1661 Canal Street
New Orleans, LA 70112
- (10) WVUE-TV Channel 8
Emmis Television Broadcasting, L.P.
1025 South Jeff Davis Pkwy.
New Orleans, LA 70125

A wholly owned subsidiary of
Emmis Communications Corp.
One Emmis Plaza
40 Monument Circle, Suite 700
Indianapolis, IN 46204

- (11) WWL-TV Incorporated
1024 North Rampart
New Orleans, LA 70116

A wholly owned subsidiary of
A. H. Belo Corporation
400 South Record Street
Dallas, TX 75202

WWL-TV/Cox Cable Joint Venture
(A non-wholly owned subsidiary of
WWL-TV Incorporated)
1024 North Rampart
New Orleans, LA 70116

- (12) WQUE-FM 93.3
WODT-AM 1280
WYLD-AM/FM
Clear Channel Broadcasting, Inc.
2228 Gravier Street
New Orleans, LA 70119
- (13) Viacom Broadcasting of Seattle, Inc.
d/b/a WUPL-TV
3850 North Causeway Blvd., Suite 454
Metairie, LA 70002

A wholly owned subsidiary of
 Viacom International, Inc.
 1515 Broadway
 New York, NY 10036

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OPINIONS BELOW

The opinions below are reproduced in the Appendix to the Petition for a Writ of Certiorari (Pet. App.). The opinion of the district court (Pet. App. 43a) is reported at 866 F. Supp. 975 (E.D. La. 1994). The original opinion of the court of appeals (Pet. App. 23a) is reported at 69 F.3d 1296 (5th Cir. 1995). This Court vacated that opinion on October 7, 1996 and remanded the matter for further consideration in light of *44 Liquormart v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 (1996). *Greater New Orleans Broadcasting Association v. United States*, 117 S. Ct. 39 (1996). The opinion of the court of appeals on remand (Pet. App. 1a) is reported at 149 F. 3d 334 (5th Cir.1998).

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1998. Broadcasters timely filed a petition for a writ of certiorari with the Court on September 2, 1998, and the Court granted the petition on January 15, 1999. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Federal criminal statute 18 U.S.C. § 1304 (Pet. App. 61a) and Federal Communications Commission ("FCC") regulation, 47 C.F.R. § 73.1211 (Pet. App. 63a), authorize criminal prosecution and administrative sanctions for the broadcast of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or part upon lot or chance"

STATEMENT OF THE CASE

1. Preliminary statement.

In its decision on remand from this Court, the Court of Appeals for the Fifth Circuit upheld the federal government's ban on the broadcast of truthful, nonmisleading advertising of legal casino gaming. The ban is an insupportable suppression of Broadcasters' right to speak freely and truthfully about a lawful commercial activity. In upholding it, the Fifth Circuit court strayed from the guidance this Court's commercial speech cases provide and established a precedent that can only engender further erosion of the First Amendment's guarantee of free speech. Furthermore, the Fifth Circuit court's decision created a fundamental

and irreconcilable conflict with the decision of the Court of Appeals for the Ninth Circuit in *Valley Broadcasting Co. v. United States*, 107 F. 3d 1328 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998). That court held that the same advertising ban violated the First Amendment, as did the United States District Court for the District of New Jersey in *Players International, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997). Accordingly, Broadcasters respectfully submit that the Court should reverse the judgment of the Fifth Circuit court and declare the Government's ban to be a violation of the First Amendment.

2. The Government's advertising ban.

The Greater New Orleans Broadcasters Association ("GNOBA") is a non-profit trade association representing member television and radio stations in the New Orleans, Louisiana area in matters affecting the broadcast industry. The remaining petitioners are several GNOBA members (the petitioners are hereinafter collectively referred to as "Broadcasters").

Federal law prohibits Broadcasters from airing advertising for lawful casino gaming, including lawful casino gaming conducted in Louisiana and Mississippi pursuant to detailed state regulatory regimes. The federal ban on broadcast advertising for casino gaming is contained in federal criminal statute 18 U.S.C. § 1304 (Pet. App. 61a) and its corresponding Federal Communications Commission ("FCC" or

"Commission") regulation, 47 C.F.R. § 73.1211 (Pet. App. 63a), which Congress enacted as section 316 of the Communications Act of 1934 (the respondents, FCC and United States of America, are hereinafter collectively referred to as the "Government"). The Government may impose monetary forfeitures, broadcast license revocation, criminal fines and imprisonment of up to one year against radio and television broadcasters that violate its ban.

In its present form, the ban is but a wisp of what Congress originally enacted -- a blanket prohibition on broadcast lottery advertising. What remains of that prohibition is a punitive regulatory scheme, undermined by a hodgepodge of congressionally-mandated exceptions. Those exceptions gut any remaining vestiges of the ban's purpose and any constitutional validity it might have had, by permitting, and indeed encouraging, what the original regulatory scheme explicitly forbade, namely the broadcast of lottery advertising.

Passage of these exceptions has paralleled a substantial, nationwide increase in governmental tolerance and encouragement of all forms of legalized gaming. In 1975, Congress exempted advertising of state-conducted lotteries by stations licensed in states permitting such lotteries. 18 U.S.C. § 1307(a)(1) (Pet. App. 62). Congress passed this exception so that state-conducted lotteries would flourish, and indeed they have; today, thirty-seven states and the District of Columbia sponsor lotteries. In 1988, the Government

decided to permit American Indian tribes to operate casinos and to encourage broadcast advertising for gaming at those casinos pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*; 47 C.F.R. § 73.1211(c)(3) (Pet. App. 64a). Today, casino gaming is conducted by American Indian tribes in more than thirty-three states.

Congress has carved out another exception permitting broadcast advertising of gaming sponsored by non-profit or governmental entities for charitable purposes. 18 U.S.C. 1307(a)(2)(A) (1988) (Pet. App. 62a); 47 C.F.R. § 73.1211(c)(4) (Pet. App. 65a). Fishing contests, sporting events or contests, and occasional and ancillary lotteries conducted by commercial organizations other than casinos all constitute full-blown lotteries under the Government's interpretation of its ban, but broadcasting advertising for those forms of gaming is also permitted under exceptions to the ban. 18 U.S.C. § 1305 (1950); 1307(d) (1988); 1307(a)(2)(B) (1988) (Pet. App. 61a-63a); 47 C.F.R. § 73.1211 (Pet. App. 63a). Gaming in all of its forms, along with Government-sanctioned broadcasts promoting it, are now part of mainstream America. Some form of legalized gaming is allowed today in forty-seven states. Private, non-Indian casino gaming is legal in twenty-two states.

3. *Decisions of the lower courts.*

On February 25, 1994 in the District Court for the Eastern District of Louisiana, Broadcasters challenged the constitutionality of § 1304 and § 73.1211, invoking that court's jurisdiction pursuant to 28 U.S.C. § 1331. In opposing the action, the Government filed a cross-motion for summary judgment without submitting any evidence to justify the scope or demonstrate the effectiveness of its ban. Responding to the parties' cross-motions for summary judgment, the district court entered a summary judgment in favor of the Government on November 30, 1994. Pet. App. 59a. Broadcasters timely appealed to the Court of Appeals for the Fifth Circuit, and in a two-to-one decision an appeals court panel affirmed the district court's judgment. Pet. App. 23a. Broadcasters sought review by this Court, which, on October 7, 1996, vacated the decision of the Fifth Circuit court and remanded the case for reconsideration in light of *44 Liquormart*, which the Court had decided after the Fifth Circuit court's original decision. On July 30, 1998, the same panel once again affirmed the judgment of the district court in a two-to-one decision. Broadcasters again sought review by this Court, which granted Broadcasters' petition for a writ of certiorari on January 15, 1999.

When it first reviewed the Government's ban, the majority of the appeals court panel recited the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343 (1980), but the panel majority did not require that the

Government justify the ban with evidence.¹ In its first petition for certiorari to this Court, Broadcasters criticized the panel majority's failure to require proof of the ban's effectiveness and narrow scope. While that petition was pending, the Court decided *44 Liquormart*, which substantially clarified the Government's burden of proof. Shortly thereafter, the Court granted Broadcasters' petition and instructed the Fifth Circuit court to revisit the matter.

On remand, the appeals court instructed the parties to file supplemental briefs concerning the effect of *44 Liquormart* on the legitimacy of the Government's advertising ban. In its brief, the Government conceded that it was required to furnish evidence to support the ban and cited a mishmash of non-legal sources for a brand new contention -- that the ban effectively

¹ *Central Hudson* provides that:

For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566, 100 S. Ct. at 2351. The parties have never disputed that the advertising at issue concerns a lawful activity and is truthful and non-misleading.

suppressed compulsive gambling. But, none of the material the Government cited suggested a causal connection between broadcast advertising for gaming and compulsive gambling. Indeed, in its opinion on remand, the panel majority itself correctly found that the Government's revamped effort to support the ban "suffers fatally, however, because none of its sources specifically connect casino gambling and compulsive gambling with broadcast advertising for casinos." Pet. App. 13a. But in spite of this finding, the panel majority then proceeded to do exactly what the Government attempted -- on its own notice it cited more unsubstantiated hearsay from newspaper columnists, politicians and other non-legal sources, absolutely none of which even referred to, much less proved anything about, the advertising ban *sub judice*. Pet. App. 11a, n. 9; 12a-13a, n. 10; 14a, n. 11; 15a, n. 12.

In addition, the panel majority repeatedly voiced its dissatisfaction with 44 *Liquormart*, claiming that fragmentation of the Court in the case left the lower courts without direction. Instead, the panel majority relied on the Court's earlier decisions in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 487 U.S. 328, 106 S. Ct. 2968 (1986) and *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S. Ct. 2696 (1993) to uphold the Government's ban.

As he did in his original opinion in this case, Chief Judge Politz dissented. He stated that "the stricter standard employed by the Supreme Court in 44 *Liquormart* only strengthens my convictions," by

making it even more apparent that the ban is unconstitutional. He further stated:

Read together, the opinions in 44 *Liquormart* teach that the government must use direct methods of controlling disfavored behavior. This, combined with the heavy burden of proof that is now placed on the government, substantially undercuts the validity of laws, such as the statute at issue here, which restrict nondeceptive commercial information.

Pet. App. 21a. And, he concluded that:

If not so viewed previously, it must now be recognized that the statutory advertising proscription at bar herein simply fails to advance directly the government's asserted interests. . . . The numerous exceptions and inconsistencies contained in the publication ban abundantly undermine and are adverse to the asserted government interests, precluding the material advancement thereof. In addition, given the many exceptions, the government has totally failed to meet its burden of proving that a nationwide ban is mandated.

Pet. App. 21a-22a.

SUMMARY OF THE ARGUMENT

Truthful, non-misleading advertising has been specifically entitled to First Amendment protection since 1976, when the Court held that it is "indispensable" to the preservation of our free enterprise economy. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765, 96 S. Ct. 1817, 1827 (1976). If truthful, non-misleading advertising may be restricted at all, the government must prove -- with convincing evidence presented in court -- that its restriction satisfies the four-part test the Court set forth in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343 (1980). That test prohibits suppression of truthful, non-misleading advertising for lawful goods and services unless the government demonstrates that such suppression directly and materially advances a substantial governmental interest and is no more extensive than necessary to so advance that interest.

The parties do not dispute that the Government's advertising ban prohibits broadcast of truthful, nonmisleading advertising for a lawful commercial activity and thus satisfies the first part of the *Central Hudson* test. However, the remaining three parts of the test are at issue. This Court's commercial speech cases make it clear that under *Central Hudson* the Government carries a heavy burden to prove that it has (2) a substantial interest (3) that is directly and materially advanced by a ban (4) that is no more extensive than

necessary. The Court has made it clear again and again that the Government may not rely on speculation or conjecture to meet its heavy burden of proof; it must adduce facts in court to satisfy each of these last three parts of *Central Hudson*.

The Government has never succeeded in identifying a substantial federal interest that is served by its ban. The Government originally asserted that its ban was imposed to address two interests: an interest in suppressing public participation in gaming and an interest in "backstopping" the policies of the few states that have not yet legalized gaming. But, there is no evidence in the record to support a contention that either of these interests is substantial. In fact, more than forty-seven states have determined that regulated gaming has benefits that outweigh any costs it imposes and have therefore legalized gaming. Furthermore, this Court's prior cases lend no support at all to the Government's assertion. Indeed, this Court has specifically recognized a federal interest in accommodating state policies concerning gaming -- an interest that the Government's ban tramples underfoot. After two and a half years of litigation, the Government suddenly decided that its ban was intended to serve another interest: an interest in reducing the incidence of compulsive gambling. But, the Government's latest tactic is not only procedurally inappropriate, it is also ineffective, because the Government has not provided one scintilla of evidence connecting broadcast advertising of casino gaming and compulsive gambling. Thus, the Government's ban fails *Central Hudson*'s second part.

The Government's ban also fails *Central Hudson's* third part, because the Government cannot provide any convincing evidence that its advertising ban advances any of the interests it asserts, much less that the ban *directly and materially* advances those interests. And, it is inconceivable that such evidence could exist, because the ban is so fraught with internal inconsistencies that it simply cannot shield the general public or compulsive gamblers from information regarding casino gaming. In fact, the federal scheme encourages Broadcasters to air advertising of gaming conducted at casinos operated by American Indian tribes, as well as advertising of other forms of gaming.

Finally, the Government's advertising ban fails *Central Hudson's* fourth part, because the ban is more extensive than necessary to serve the Government's asserted interests. Not only has the Government failed to introduce evidence necessary to meet its burden of proving "narrow tailoring," but the Government has failed to address the abundance of nonspeech regulatory means that could easily serve the Government's asserted interests.

The Government's advertising ban fails each and every part of the *Central Hudson* test. The Fifth Circuit court's application of the *Central Hudson* analysis to uphold the Government's advertising ban cannot be reconciled with the guidance this Court's commercial speech cases provide. Accordingly, Broadcasters respectfully request that the Court reverse the appeals

court and declare that the Government's advertising ban violates the First Amendment.

ARGUMENT

The decision of the appeals court fails to adhere to the requirement -- articulated repeatedly in the Court's jurisprudence -- that lower courts engage in an independent and searching judicial inquiry when evaluating restrictions on speech protected by the First Amendment. As a result, Broadcasters' truthful, non-misleading advertising has been banned from the airwaves based upon nothing more than an unfounded and paternalistic legislative preference for keeping citizens ignorant of certain legal gaming activities.

I. Under this Court's precedents, the Government must introduce evidence in support of its restrictions on commercial speech, and before a court may uphold such restrictions, it must carefully scrutinize that evidence and find it convincing.

In the commercial marketplace, the general rule is that the speaker and the audience, not the government, assess the value of information presented. *Edenfield v. Fane*, 507 U.S. 761, 767, 113 S. Ct. 1792, 1798 (1993). The critical importance of this rule in a free society has led the Supreme Court to require that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71, n. 20, 103 S. Ct. 2875, 2883, n. 20 (1983). Thus, the heart of a court's

role in evaluating a governmental restriction on truthful commercial speech is to determine whether the facts in the record justify the restriction. Courts must subject such speech restrictions to the probing scrutiny mandated by *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980):

For commercial speech to come within [the protection of the First Amendment], it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Unquestioning deference to legislative action is inconsistent with the careful scrutiny *Central Hudson* demands, and such deference finds very little support in this Court's cases interpreting the First Amendment. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843, 98 S. Ct. 1535, 1543 (1978). The requirement that courts engage in an independent and searching examination of any asserted basis for suppression of truthful commercial speech is vital, because, as this Court has stated, without such scrutiny, the government could "with ease restrict commercial speech in the

service of other objectives that could not themselves justify a burden on commercial expression." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487, 115 S. Ct. 1585, 1592 (1995), quoting *Edenfield*, 507 U.S. at 770, 113 S. Ct. at 1800. This established and fundamental principle is not altered when a court is confronted with suppression of commercial speech concerning activities that are purported to be "socially harmful." *Rubin*, 514 U.S. at 482, n.2, 115 S. Ct. at 1589, n.2. Simply put, in every case such as this one, a court must bring to bear its "independent judgment" of the evidence presented. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 155, 129, 109 S. Ct. 2829, 2838 (1989).

The Court's recent treatment of commercial speech doctrine in *44 Liquormart v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495 (1996), reaffirms the substantial burden the government must bear when it undertakes to suppress truthful, non-misleading advertising for lawful activities. In *44 Liquormart*, the Court considered a challenge by liquor stores to a Rhode Island statute that forbade advertisements for liquor that contained price information. The state defended the statute as a means of promoting temperance. All nine justices agreed that the ban violated the First Amendment. In the principal opinion, Justice Stevens wrote that "[a] commercial speech regulation 'may not be sustained if it provides only ineffective or remote support for the government's purpose.'" *44 Liquormart*, 517 U.S. at 505, 116 S. Ct. at 1509 (citing *Central Hudson*, 447 U.S. at 564, 100 S. Ct. at 2350). Rejecting Rhode Island's arguments concerning the efficacy of its speech restrictions, Justice Stevens stated that "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the

price advertising ban will significantly advance the State's interest in promoting temperance." *Id.* He refused to engage in "the sort of 'speculation or conjecture' that is an unacceptable means of demonstrating that a restriction on commercial speech directly advances the State's asserted interest. Such speculation certainly does not suffice when the state takes aim at accurate commercial information for paternalistic ends." *Id.*, 517 U.S. at 507, 116 S. Ct. at 1510 (citations omitted).

Similarly, in her concurring opinion Justice O'Connor stated,

Since *Posadas*, . . . this Court has examined more searchingly the State's professed goal, and the speech restriction put into place to further it, before accepting a State's claim that the speech restriction satisfies First Amendment scrutiny In each of these cases we declined to accept at face value the proffered justification for the State's regulation, but examined carefully the relationship between the asserted goal and the speech restriction used to reach that goal. The closer look that we have required since *Posadas* comports better with the purpose of the analysis set out in *Central Hudson*, by requiring the State to show that the speech restriction directly advances its interest and is narrowly tailored.

Id., 517 U.S. at 531-32, 116 S. Ct. at 1522 (citations omitted).

Justice Thomas went even further in his criticism of paternalistic suppression of commercial speech, stating,

In cases such as this, in which the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices in the marketplace, the balancing test adopted in [*Central Hudson*] should not be applied, in my view. Further, such an 'interest' is per se illegitimate and can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech.

Id., 517 U.S. at 518, 116 S. Ct. 1516 (Thomas, J., concurring).

Thus, the pronouncements of the Court are clear and consistent: lower courts must engage in an independent and searching judicial inquiry when evaluating commercial speech restrictions imposed by the government, and can only uphold such bans where the government demonstrates in court with convincing evidence that they directly and materially advance a substantial governmental interest and are no more extensive than necessary in order to do so.²

² The Fifth Circuit court mistakenly analogized the Government's ban to a "time, place and manner" restriction. Pet. App. 16a. But, the ban cannot possibly meet this Court's

II. The Government's ban cannot survive the probing scrutiny that *Central Hudson* requires.

In this case, the parties do not dispute that the advertising in question is both truthful and nonmisleading and that it involves commercial activity that is lawful. *Cf. United States v. Edge Broadcasting Company*, 509 U.S. 418, 113 S. Ct. 2696 (1993) (upholding an advertising ban applied to broadcasters licensed to communities where the advertised activity was illegal). Thus, there is no question that the first part of the *Central Hudson* test is satisfied.

A. The Government failed to identify a substantial federal interest in banning broadcast advertising for lawful casino gaming.

Central Hudson next required the appeals court to "examine . . . searchingly the State's professed goal" to determine whether it constitutes a substantial governmental interest. 44 *Liquormart*, 517 U.S. at 531, 116 S. Ct. at 1522 (O'Connor, J., concurring). But, the appeals court glossed over this second part of the *Central Hudson* analysis in a single sentence, citing to the Court's conclusion in *Posadas* that the Puerto Rico legislature had a substantial interest in protecting the health, safety and welfare of its citizens. Pet. App. 4a.

requirement that "time, place and manner" restrictions be content-neutral, in light of the fact that the ban expressly applies to speech with a specific content -- casino gaming advertising. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-29, 113 S. Ct. 1505, 1516-17 (1993). The court did not state whether its mischaracterization of the ban affected the level of scrutiny it applied in reviewing it.

The defect in the approach of the appeals court lies in the fact that *Posadas* merely affirmed an interest of the states, not an interest of the federal government. As this brief has already shown, the states have actively examined the effects of legal gaming on their citizens and the vast majority of them have determined that, on balance, legalized and regulated gaming is beneficial. *See supra* at 4-5. In fact, the only federal interest identified by the Court in *Posadas* was the same one the Court identified in *Edge*, namely an interest in balancing the various policies of the states concerning gaming, and that interest is sacrificed by the Government's enforcement of its nationwide ban. In addition, the appeals court failed to give proper weight to the wholly inconsistent nature of the Government's approach to regulating gaming, which should have precluded a finding by the court that the Government has a substantial interest in suppressing legal gaming. Although the Government prohibits broadcast advertising for private casino gaming, it permits broadcast advertising for casino gaming conducted by American Indian tribes, as well as other types of gaming. Indeed, the Government encourages casino gaming itself, where it is conducted at casinos operated by American Indian tribes, and does so notwithstanding objections from the states where some of the casinos are located. Thus, there is no jurisprudential or legislative support for the Government's contention that it has a substantial interest in nationwide suppression of speech concerning legal gaming.

In addition, the Government's sudden decision to divert the appeals court's attention away from overall public participation in legal gaming and to focus it instead on compulsive gambling calls into question the

legitimacy of the Government's earlier asserted interests. Throughout the more than two and a half years of litigation prior to its supplemental brief on remand by this Court, the Government consistently asserted that its casino advertising ban was designed to generally suppress all public participation in gaming and to "backstop" the policies of the few states that prohibit gaming. In its supplemental brief on remand, the Government grudgingly acknowledged that it was questionable whether the "host of social and economic problems" that it claimed resulted from gaming could be effectively addressed by the ban, stating that, "with respect to some of those problems, such as organized crime, the relative effectiveness of advertising restrictions and non-speech regulatory alternatives may be open to debate." Supplemental Brief for the Appellees at 11. Accordingly, at the eleventh hour, the Government attempted to create a new, more narrow federal interest -- one that addresses only compulsive gambling. This new *post hoc* justification for the ban conflicts with the earlier claim by the Government in *Edge* that it has an interest in balancing the various policies of the states, which have traditionally regulated gaming. See *infra* at 27. Still, the appeals court accepted the Government's contention that its initial broadly stated interests were substantial and seemed to accept, without any evidence or, indeed, any analysis by the Government that the Government's discussion of compulsive gambling provided an illustration of the substantiality of the Government's initial asserted interests.

The appeals court's superficial treatment of *Central Hudson*'s second part cannot be reconciled with this Court's requirement that courts carefully examine

evidence concerning the substantiality of the Government's asserted interests. The Government's *post hoc* adoption of shifting interests illustrates the fact that, in reality, there is no substantial federal interest addressed by the Government's ban. Accordingly, the Court should declare the ban to be a violation of the First Amendment.³

B. The Government's ban does not directly and materially advance its asserted interests and is not narrowly tailored to do so.

After brushing aside the second part of the *Central Hudson* analysis, the decision of the appeals court focused more intently on the application of the third and fourth parts of *Central Hudson*. The panel majority opined that "after 44 *Liquormart*, what level of proof is required to demonstrate that a particular commercial speech regulation directly advances the state's interest is unclear." Pet. App. 7a. The panel majority seemed to say that, because it believed that 44 *Liquormart* was unclear in some respects, the court was free to adopt the legal standard it preferred, namely a

³ The Government never explained, and the appeals court never required it to explain, how to mesh its earlier asserted interests in generally suppressing public participation in gaming and supporting the policies of non-gaming states with its later asserted interest in reducing compulsive gambling, even though it is obvious that these asserted interests are not coextensive. It is likely that a ban narrowly tailored to materially advance an interest in reducing compulsive gambling would be much more narrow than a ban intended to broadly suppress public participation in gaming and both would be different from a ban intended to defend the interests of non-gaming states (interests that could vary from state to state).

Posadas-inspired exception to *Central Hudson* permitting wholesale advertising restrictions where such advertising concerns so-called vice activities.

The manifest error in this approach lies in the fact that after *44 Liquormart* there is no lack of clarity regarding the invalidity of *Posadas*. Justice Stevens, writing in *44 Liquormart* on behalf of four justices, stated that "*Posadas* erroneously performed the First Amendment analysis" and that the Government "does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate." *44 Liquormart*, 517 U.S. at 509-10, 116 S. Ct. 1511. In her concurrence, and on behalf of an additional four justices, Justice O'Connor stated that the evolution of commercial speech doctrine since *Posadas* requires courts reviewing commercial speech restrictions to take a "closer look" at the government's proffered justification for such restrictions and "examine[] more searchingly" the government's assertions that the restrictions further the government's interest and are no more extensive than necessary to serve that interest. *Id.*, 517 U.S. at 531-32, 116 S. Ct. at 1522 (citations omitted).

Thus, insofar as deference to legislative judgment is concerned, *44 Liquormart* could not be more clear. Courts may no longer exercise the deference to what the legislature believes to be reasonable that the Court permitted in *Posadas*, and the Government must prove -- with convincing evidence presented in a court of law -- that its commercial speech bans directly and materially advance substantial governmental interests and are narrowly tailored to do so. But, rather than take the

"closer look" that Justice O'Connor discussed, the panel majority clung tightly to *Posadas*, citing that case no fewer than nine times.

1. The Government's casino advertising ban cannot directly advance its asserted interests in a material way, and therefore fails the third part of the *Central Hudson* test.

a. The Government failed to carry its burden of proving that the ban directly and materially serves the interests the Government asserts.

Central Hudson's third part requires that the Government furnish convincing evidence showing that its ban is effective. The Government cannot meet its burden under the third part of *Central Hudson* by relying on "speculation and conjecture." *Rubin*, 514 U.S. at 487, 115 S. Ct. at 1592 (quoting *Edenfield*, 507 U.S. at 770, 113 S. Ct. at 1800). "Such speculation certainly does not suffice when the state takes aim at accurate commercial information for paternalistic ends." *44 Liquormart*, 517 U.S. at 507, 116 S. Ct. at 1510 (Stevens, J.).

But, in this case the Government did not present, and the appeals court did not require, evidence showing that its ban directly and materially advances the Government's asserted interests. The panel majority correctly held that the Government's last-minute treatment of compulsive gambling was not only procedurally inappropriate, but it was also unavailing, because it failed to establish any connection between broadcast advertising for casino gaming and compulsive gambling. Pet. App. 11a-13a. But, notwithstanding this

finding, the panel majority went on to state that the Government had no burden "to establish a direct, quantitative evidentiary link" between broadcast advertising of casino gaming and compulsive gambling -- a view that undercuts the "direct and material advancement" requirement of *Central Hudson* and cannot possibly satisfy the requirement that courts rule out "speculation and conjecture" and take a "closer look" at the evidence furnished by the government in support of its speech restrictions. The panel majority then proceeded to introduce its own research and argumentation regarding compulsive gambling. Pet. App. 11a, n. 9; 12a-13a, n. 10; 14a, n.11; 15a, n.12. Its citations, like the Government's, did not even refer to, much less establish, the required causal link between broadcast advertising for private, state-regulated casino gaming and compulsive gambling. Thus, the panel majority's citations could not amount to the convincing evidence of direct and material advancement that this Court requires where the government deprives its citizens of the right to speak and hear about certain lawful activities.

In essence, the appeals court upheld the Government's ban based solely on a presumption that the ban served the interests the Government asserted. The appeals court based its mistaken belief that the Government had no burden to furnish evidence under *Central Hudson*'s third part on an erroneous conclusion that "*44 Liquormart* does not disturb the series of decisions that has found a commonsense connection between promotional advertising and the stimulation of consumer demand for the products advertised." Pet. App. 8a. But, where advertising for a product is suppressed, "without any finding of fact, or indeed any

evidentiary support whatsoever, we cannot agree with the assertion that the . . . advertising ban will *significantly* advance the State's interest . . ." *44 Liquormart*, 517 U.S. at 505, 116 S. Ct. at 1509 (Stevens, J.) (emphasis supplied); *see also Rubin*, 514 U.S. at 487-88, 115 S. Ct. at 1592; *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2153 (1997) (Souter, J., dissenting). Thus, the panel majority improperly relied upon "speculation or conjecture" regarding the efficacy of the Government's advertising ban.

In addition, the panel majority incorrectly relied upon *Posadas*, precisely as it had in its pre-*44 Liquormart* opinion, for the proposition that proof that the Government's ban directly advances the Government's interests was "evident from the casinos' vigorous pursuit of litigation to overturn it." Pet. App. 32a (original opinion) and 10a (opinion on remand). But *44 Liquormart* explicitly prohibited such reasoning. In that case, Justice Stevens stated that the mere fact that the plaintiffs challenged a speech restriction in no way provided evidence of the restriction's effectiveness. *44 Liquormart*, 517 U.S. at 506, n.16; 116 S. Ct. at 1510, n. 16. Relying on *Posadas* instead of *44 Liquormart*, the panel majority eviscerated the third part of the *Central Hudson* test, by holding that the Government automatically satisfied *Central Hudson*'s third part the moment Broadcasters filed a lawsuit to vindicate their rights under the First Amendment.⁴

⁴ Furthermore, the panel majority's reasoning ignored the important fact that, in this case, it is not casinos that challenged the ban, it is Broadcasters, who must compete with other media that are permitted to publish

b. The irrationality of the Government's ban prevents it from directly and materially advancing the interests the Government asserts.

The panel majority's presumption that the Government's ban materially reduces public participation in gaming is particularly unjustified, because there is "little chance that [censoring broadcast advertising of lawful casino gaming] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Rubin*, 514 U.S. at 489, 115 S. Ct. at 1593. The Government's advertising ban is an irrational hodgepodge of conflicting exceptions concerning who may speak, what they may say, and what medium they may use. Therefore, even assuming, purely for the sake of argument, that the general public or compulsive gamblers are susceptible to broadcast advertising, the Government's ban is conspicuously ill-suited to shielding them from it. Broadcasters are free to air advertisements that feature gaming conducted on Indian reservations in more than thirty-three states and are permitted to broadcast advertisements that feature parimutuel betting and other sports betting (see Report and Order in MM Docket 83-842, *In the Matter of Elimination of Unnecessary Broadcast Regulation*, 56 Rad. Reg. 2d (P&F) 976, 49 Fed. Reg. 33,264 (1984)), as well as state-operated lotteries. See 47 C.F.R. § 73.1211(c)(1) (Pet. App. 64a). Broadcasters in any state may air advertisements that use the word "casino" where it is part of the advertiser's name, as well as advertisements that convey the atmosphere of casinos

advertising of gaming at private casinos.

and tout the "non-stop Vegas-style excitement" available at casinos. Memorandum Opinion and Order, *In re WTMJ, Inc.*, 8 FCC Rcd. 4354 (Mass Media Bureau 1995). Permissible advertisements for casinos routinely feature images of enthralled casino patrons, as well as flashing lights and other elements of casino decor "that combine to create the ambiance popularly associated with Las Vegas establishments." *Id.* Thus, the Government's ban cannot reasonably be expected to materially advance its asserted interests.

Both in *Valley Broadcasting* and in *Players International*, courts reviewing the legitimacy of the Government's ban in the wake of *44 Liquormart* found that the ban failed the third part of the *Central Hudson* inquiry. Those courts concluded that the ban's conflicting exceptions so completely undercut its effectiveness that it cannot directly and materially advance the Government's asserted interests. However, in this case the panel majority did not even acknowledge the existence of *Players International*, and it quickly brushed aside the conflicting decision of the appeals court in *Valley Broadcasting* by simply concluding that the Ninth Circuit court relied on an incorrect reading of *Rubin* when it found that the myriad of inconsistent exceptions to the ban prevented it from materially advancing the Government's asserted interests. Yet, the reasoning of the Ninth Circuit court was as logical as it was succinct: "because [the Government's ban] permits the advertising of commercial lotteries by not-for-profit organizations, governmental organizations and Indian Tribes, it is impossible for it materially to discourage public participation in commercial lotteries." *Valley*

Broadcasting, 107 F. 3d at 1335.⁵ Instead of considering the logic of the Ninth Circuit court and the guidance it provided, the panel majority here simply reiterated its pre-*44 Liquormart* view that, in enacting the ban, the Government made "legitimate, quintessentially legislative choices" that the panel majority would neither review nor disturb. Pet. App. 33a (original opinion) and 9a (opinion on remand).

The panel majority attempted to make much of selected dicta in *Edge*. Pet. App. 2a-3a and 17a. There, the Court said that Congress might not have been compelled by the First Amendment to create the exception to the gaming advertising ban that permits broadcasters located in states that operate lotteries to advertise any state-sponsored lottery. *Edge*, 509 U.S. at 428, 113 S. Ct. at 2704. But the fact is, Congress did create this and numerous other exceptions and, in so doing, undercut whatever integrity the advertising ban may have ever had. In addition, unlike the statute the Court reviewed in *44 Liquormart* and unlike the statute under review here, the state lottery exception the Court considered in *Edge* was designed to bar advertising only in states where the advertised activity was illegal. Thus, *Edge* may continue to be a valid precedent after *44 Liquormart*, but only because the advertising at issue in *Edge* proposed a transaction that was illegal in the state where it was broadcast. *44 Liquormart*, 517 U.S. at 509,

⁵ The New Jersey district court in *Players International* similarly concluded, "the underlying governmental policy, banning nonmisleading commercial messages about gaming activities from the public, is subverted by the exceptions to [the ban]." *Players International*, 988 F. Supp. at 506.

116 S. Ct. at 1511 (Stevens, J.). As Justice Stevens cautioned in *44 Liquormart*, *Edge* most certainly does not establish the degree of deference to Congress to which the Government is entitled where it undertakes to suppress speech about lawful conduct. *Id.* Yet, the panel majority explicitly relied on *Edge* when it stated that this Court's cases "[do] not inhibit all legislative flexibility in confronting challenging social developments." Pet. App. 18a. The panel majority's heavy reliance upon *Edge* was misplaced.

Edge is readily distinguishable from this case in another important respect. In *Edge*, the Court upheld the state lottery exception to the Government's ban on the basis that it was narrowly tailored to serve an interest in balancing the competing policies of lottery and non-lottery states. *Edge*, 509 U.S. at 435, 113 S. Ct. at 2708. Here, on the other hand, the Government asserted an entirely different interest -- one that is inconsistent with the federalism interest identified in *Edge*. The Government claims here it is protecting the interests of the handful of non-gaming states, but obviously it can only do so at the expense of the interests of the many states that have legalized gaming. Thus, the irrationality of the Government's ban is complete. On the one hand, the overall scheme is intended to serve one interest, while on the other hand, a component of the scheme, the state lottery exception, is intended to serve another interest that is mutually inconsistent with the overall purpose of the ban. This is precisely the kind of illogical regulatory scheme that cannot withstand First Amendment scrutiny after *44 Liquormart* and *Rubin*.

2. The Government's casino advertising ban is more extensive than necessary to serve the Government's asserted interests, and therefore fails the fourth part of the *Central Hudson* test.

The fourth part of the *Central Hudson* analysis requires that the Government demonstrate with evidence that its ban is no more extensive than necessary to serve its asserted interests. That requirement is reiterated in *44 Liquormart*, where Justice O'Connor stated that "[t]he State's regulation must indicate a 'carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition.'" *44 Liquormart*, 517 U.S. at 529, 116 S. Ct. at 1521 (citations omitted); *City of Cincinnati*, 507 U.S. at 417, n. 13, 113 S. Ct. at 1510, n. 13 (1993). The fourth part of *Central Hudson* is not met if there are obvious alternative means of serving the Government's interests that would impose a lesser burden, or no burden at all, on protected speech. See *44 Liquormart*, 517 U.S. at 530, 116 S. Ct. at 1522 (O'Connor, J., concurring); *Rubin*, 514 U.S. at 490-91, 115 S. Ct. at 1593-94; *Ibanez v. Florida Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 142-43, 114 S. Ct. 2084, 2088-89 (1994).

In this case, the appeals court acknowledged that,

[a]fter *44 Liquormart*, . . . the fourth-prong 'reasonable fit' inquiry under *Central Hudson* has become a tougher standard for the state to satisfy. Little deference can be accorded to the state's legislative determination that a commercial speech restriction is no more

onerous than necessary to serve the government's interests.

Pet. App. 10a-11a. However, in spite of these observations, the panel majority went on to grant remarkable deference to the Government in connection with its advertising ban. The panel majority seemed to conclude that, if a speech restriction such as this one includes a variety of exceptions -- "quintessentially legislative choices," as the panel majority called them (Pet. App. 9a) -- then it must be reasonably tailored to fit the Government's goals. In essence, the panel majority held that the mere "ambivalence" toward the various forms of gaming embodied in the Government's ban -- "ambivalence" unsupported by reason, much less by evidence presented to the court -- was sufficient to demonstrate a reasonable fit between the ban and the Government's asserted interests. Pet. App. 14a-16a. For support of this oddly distorted interpretation of *Central Hudson*'s fourth part, the majority turned to this Court's decision in *Edge*. But, as this petition has already shown, *Edge* arguably stands for little more than the proposition that the Government may restrict commercial speech that proposes an illegal transaction, i.e. speech that fails *Central Hudson*'s first part. See, *supra* at 27-28. At the very least, *Edge* most certainly cannot provide a basis for the appeals court's finding that, even though the Government failed to bring forth proof of narrow tailoring, the ban passed muster under *Central Hudson*'s fourth part.

Furthermore, the panel majority erroneously stated that Broadcasters "have identified no non-speech-related alternatives to § 1304 as a means of assisting anti-gambling states." Pet. App. 17a. This was a

conspicuous oversight, since Broadcasters' reply brief on remand enumerated seventeen alternatives. In the first place the Government has not attempted to outlaw gaming. The Government could sponsor its own broadcast announcements to counteract advertising for casinos, and the Government could undertake a variety of other direct approaches to the regulation of gaming. For example, the Government could easily sponsor or mandate: (1) in- and out-patient treatment programs for compulsive gamblers, (2) prevention and educational programs in schools and communities, (3) crisis and intervention services, (4) referral services, (5) toll-free counseling hotlines, (6) public service announcements in broadcast and other media, (7) training for counselors and other professionals who deal with compulsive gamblers, (8) distribution of informational brochures at casinos, (9) informational and educational displays at casinos, (10) publication of hotline numbers at all casinos and on all casino documentation, (11) development of gambling awareness curricula in concert with educational institutions, (12) distribution of informational and educational videos, (13) informational inserts in governmental employee paychecks, (14) certification programs for compulsive gambling counselors, (15) informational and educational programs for prison inmates, and (16) youth awareness programs.

"It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [Government's asserted] goal[s]." *44 Liquormart*, 517 U.S. at 507, 116 S. Ct. at 1510 (Stevens, J.); *see also id.* 517 U.S. at 530, 116 S. Ct. at 1522 (O'Connor, J., concurring). This multitude of alternative means of

serving the Government's asserted interests is "readily available," and the panel majority's complete indifference to it is a grievous misinterpretation of commercial speech doctrine after *44 Liquormart*. The Government's ban fails the fourth part of *Central Hudson*, because the ban is not narrowly tailored to serve any of the Government's asserted interests. For this additional reason, the Court should reverse the appeals court's judgment and declare that the ban violates the First Amendment.

III. Conclusion.

The Government's advertising ban is an intolerable suppression of Broadcasters' right to speak freely and truthfully about lawful commercial activities. By sanctioning the ban, the Fifth Circuit court departed from this Court's teachings and established a precedent that can only engender further erosion of the First Amendment's guarantee of free speech. For these reasons, Broadcasters respectfully submit that the Court should reverse the judgment of the Fifth Circuit court and declare the Government's ban to be a violation of the First Amendment.

Respectfully submitted,

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